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No. 90-1341

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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF ENERGY, PETITIONER

v.

STATE OF OHIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Contrary to respondents' assertion, federal agencies have not "wag[ed] a nationwide campaign" (Br. in Opp. 8) to stymie state efforts to control pollution. In each case cited in the petition or brief in opposition adjudicating the liability of federal agencies to civil penalties under RCRA or the CWA, the State sued the United States or a federal agency for civil penalties. See Pet. 20, 21 & n.12, 25. The federal entity—the defendant in the case—asserted what it believed to be the valid defense of sovereign immunity. Indeed, as the petition makes clear and as the brief in opposition essentially concedes (Br. in Opp. 7-8, 10), most of the decisions in those cases have agreed with the United States that the court did not (as respondents would have it) have to "read civil penalties out of the waivers" (*id.* at 8) because provision for those penalties was never included in the waivers in the first place.

More fundamentally, we disagree with respondents' insistence (Br. in Opp. 5-8) that, because Congress

generally believed civil penalties to be an effective tool in cleaning up the environment, Congress must have intended that tool to be available against federal agencies. See Pet. 17-18. Federal agencies do not occupy the same position as do private entities with respect to civil penalties paid to a state or federal treasury. In this case, for example, the CWA federal facilities provision expressly recognizes the sensitivity of the federal-state relationship by making clear that, even if Congress were to waive immunity from federal civil penalties, there is no waiver for civil penalties that do not "aris[e] under Federal law." 33 U.S.C. 1323. The fact that the Sixth Circuit's judgment threatens to intrude into the state-federal relationship suggests that further review of the judgment by this Court is warranted.

2. Respondents also contend (Br. in Opp. 17-18) that the Ninth Circuit's decision in *California* v. *Department of the Navy*, 845 F.2d 222 (1988), does not conflict with the Sixth Circuit's decision here. According to respondents, *California* v. *Department of the Navy*, *supra*, is distinguishable from this case because "California had attempted to enforce state penalties, not by asserting a cause of action pursuant to its state civil penalty provision, but by suing directly pursuant to 33 U.S.C. 1319 and 1342(b)(7)." Br. in Opp. 17. Respondents cite a footnote in which the Ninth Circuit stated:

> Having determined that * * * § 309 [, 33 U.S.C. 1319,] does not provide an independent jurisdictional ground for the State's suit, we need not decide whether the language of §§ 309(d) and 313 contains the requisite explicit waiver of sovereign immunity to allow an action against the Navy.

845 F.2d at 225 n.3.

Respondents' suggested distinction fails to refute the existence of a square conflict between the Sixth and Ninth Circuits. It overlooks the fact that in *California* v. *Department of the Navy*, California advanced two distinct theories, and the Ninth Circuit rejected each of them.

The first theory—which is not the basis for the conflict presented in our petition—was that the CWA civil penalties provision, CWA § 309(d), 33 U.S.C. 1319(d), "in conjunction with § 313, [the CWA federal facilities provision], provides an independent jurisdictional ground for a state to seek civil penalties against federal dischargers." 845 F.2d at 224. The Ninth Circuit rejected that theory on the ground that the CWA civil penalties provision does not provide for a State—as opposed to the EPA—to bring a suit for CWA civil penalties. *Id.* at 224-225. Having thus decided that a State is not a proper plaintiff in a CWA civil penalties case, the court reserved in the footnote quoted above the further question whether in any event sovereign immunity would bar application of the CWA civil penalties provision to a federal defendant. *Id.* at 225 n.3.

Significantly, the civil penalties addressed in that aspect of the Ninth Circuit's decision were penalties assessed pursuant to the CWA itself and thus payable to the federal treasury.[1] See 31 U.S.C. 3302. They were therefore unlike the civil penalties payable to the state treasury that are at issue with respect to the first question presented in our petition. Ac-

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[1] Respondents here did advance a claim in the courts below similar in some respects to the one rejected by the Ninth Circuit in that aspect of *California* v. *Department of the Navy*, *supra*. Respondents claimed that, if the federal facilities provision of the CWA does not waive federal sovereign immunity from state civil penalties, the CWA citizen suit and civil penalties provisions at least waive federal sovereign immunity

cordingly, there was no issue—with respect to those CWA civil penalties—as to whether they "aris[e] under Federal law."

The Ninth Circuit also, however, separately addressed California's additional theory that a State could sue a federal agency for civil penalties assessed pursuant to state environmental statutes (and payable to the State) because (a) the CWA itself requires state permit programs to include civil penalty provisions, see CWA § 402(b)(7), 33 U.S.C. 1342(b)(7), and (b) such state civil penalty provisions "fall within § 313, which subjects federal dischargers to civil penalties 'arising under' federal law." 845 F.2d at 225. That is precisely the claim made by the State of Ohio in this case. See Br. in Opp. 16. In contrast to the Sixth Circuit, the Ninth Circuit rejected that claim. The Ninth Circuit held that, notwithstanding the general statutory requirement that state permit programs include civil penalty provisions, such programs "are 'not a delegation of Federal authority,' but instead are state programs which 'function[] in lieu of the Federal program.'" 845 F.2d at 225. Accordingly, in rejecting California's second theory, the Ninth Circuit concluded that the State's position "would essentially nullify § 313(a)'s express limitation of civil penalties against federal agencies to those arising under federal law." *Ibid.*[2]

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from assessment of federal civil penalties. Neither court below specifically addressed that claim, but respondents have advanced it as a separate question presented in their cross-petition filed in this case (No. 90-1517). We have filed a separate response to the cross-petition.

[2] In its recent decision in *Sierra Club* v. *Lujan*, No. 90-1183 (Apr. 30, 1991), the Tenth Circuit agreed with the Sixth Circuit that Section 313(a) waived federal sovereign immunity from assessment of civil penalties. Accord *California*

The Ninth Circuit in *California* v. *Department of the Navy*, *supra*, thus did not merely "write some unfortunate language about the meaning of 'arising under.'" Br. in Opp. 17. Rather, the Ninth Circuit squarely addressed the issue and concluded that civil penalties assessed in accordance with state permit programs do not "aris[e] under Federal law" for purposes of the CWA's federal facilities provision—a decision directly contrary to that reached by the Sixth Circuit in this case. Moreover, the Ninth Circuit reached that result by rejecting precisely the argument advanced by respondents here and by accepting instead one of the arguments that we advanced unsuccessfully in the court below. See Pet. 23-25. The Ninth Circuit's reasoning and result are thus directly contrary to the reasoning and result of the Sixth Circuit here, and there is accordingly a square conflict in the circuits on the issue.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MAY 1991

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v. *Department of the Navy*, 845 F.2d at 225. Because the issue in *Sierra Club* involved *federal* penalties, however, the Tenth Circuit did not reach the question on which the Sixth and Ninth Circuits are divided—*i.e.*, whether civil penalties under *state* water pollution control laws "aris[e] under Federal law." See *Sierra Club*, slip op. 13, 15.

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